

**STATE OF CALIFORNIA**  
**OFFICE OF ADMINISTRATIVE LAW**

**2001 OAL Determination No. 8**

**August 23, 2001**

**Requested by: JOSEF TOTH**

**Concerning: DEPARTMENT OF CORRECTIONS – Department Operations  
Manual Sections 62040.17 through 62040.19 Relating to the  
Transfer of Prisoners to Foreign Countries**

**Determination issued pursuant to Government Code Section 11340.5;  
California Code of Regulations, Title 1, Section 121 et seq.**

**ISSUE**

Do the rules contained in the Department of Corrections' Operations Manual sections 62040.17 through 62040.19 relating to the transfer of prisoners to foreign countries constitute "regulations" as defined in Government Code section 11342.600 which are required to be adopted pursuant to the rulemaking provisions of the Administrative Procedure Act?<sup>1</sup>

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1. This request for determination was filed by Josef Toth, P15035, Bldg. 430-57-U, Avenal 9, CA 93204. The Department of Corrections' response was filed by John Berecochea, Interim Assistant Director (A), Office of Correctional Planning, Department of Corrections, P.O. Box 942883, Sacramento, CA 94283-0001. This request was given a file number of 00-001. This determination may be cited as "**2001 OAL Determination No. 8.**"

## **CONCLUSION**

The rules contained in Department of Corrections' Operations Manual sections 62040.17 through 62040.19 relating to the transfer of prisoners to foreign countries are "regulations" which are required to be adopted pursuant to the Administrative Procedure Act.

## **BACKGROUND**

At the time of this determination request, Josef Toth was an inmate at Avenal State Prison. Mr. Toth states that the Department of Corrections ("Department") denied his request for transfer to a prison in a foreign country based upon Department Operations Manual ("DOM") 62040. The specific portions of DOM 62040 (entitled "Interstate/Federal/International Placements") pertaining to the transfer of prisoners to foreign countries are sections 62040.17 through 62040.19. The content of these particular sections is discussed in greater detail below.<sup>2</sup>

Under United States law (18 U.S.C. sections 4100 through 4115), foreign citizens or nationals convicted of a crime in the United States, and United States citizens or nationals convicted of a crime in a foreign country, may be transferred to their home country if a treaty (or convention) providing for transfer is in force between the United States and the foreign country involved. The United States has entered into treaties and conventions with a substantial number of countries to provide for prisoner transfers.<sup>3</sup> Of particular note, the United States is a party to the Council of Europe "Convention on the Transfer of Sentenced Persons" (sometimes referred

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2. After Mr. Toth filed his determination request, a second determination request was submitted to the Office of Administrative Law relating to the transfer of prisoners to foreign countries and DOM sections 62040.17 through 62040.19. This second request was submitted by Ray C. Kelsch, D-63773 410-1-54-L, Avenal State Prison, P.O. Box 9, 1 Kings Way, Avenal, CA 93204. Mr. Kelsch agreed to have his correspondence considered as a public comment in connection with Mr. Toth's request (rather than as a separate request for determination). Mr. Kelsch's comments have been taken into consideration.
  3. See U.S. Department of State, *Prisoner Transfer Treaties*, Web site <http://travel.state.gov/transfer.html> [as of August 23, 2001].

to as the “COE Convention” or the “Strasbourg Convention”) which provides for prisoner transfers among nearly 50 countries.<sup>4</sup>

To permit the transfer of persons in California correctional and other facilities under these transfer treaties and conventions, California Government Code section 12012.1 was enacted to read as follows: “Whenever a treaty is in force providing for the transfer of offenders between the United States and a foreign country, the Governor or his designee is authorized to give the approval of the state to a transfer as provided in the treaty, upon the application of a person under the jurisdiction of the Department of Corrections, the Department of the Youth Authority, and State Department of Health Services.” The Chairman of the Board of Prison Terms, as the Governor’s designee, has been given the authority to approve or disapprove the transfer of prisoners to foreign countries in specific cases, at least with respect to transfers under the “Convention on the Transfer of Sentenced Persons.” (See California Code of Regulations (“CCR”), Title 15, section 2870.) The Board of Prison Terms also exercises some authority in connection with its “Foreign Prisoner Transfer Program.” (See Pen. Code, sec. 2912.)

Even though the transfer of prisoners to foreign countries is chiefly administered in California by the Board of Prison Terms and its Chairman, the Department of Corrections becomes involved in the process when prisoners who are in the custody of the Department apply for transfers to their home countries.<sup>5</sup> The

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4. The Council of Europe “Convention on the Transfer of Sentenced Persons,” March 21, 1983, 35 U.S.T. 2867, T.I.A.S. 10824.

5. The Department’s role in the transfer of prisoners to foreign countries appears to be largely authorized by the general provisions of Penal Code section 5054, which (as discussed below) vests in the Director of Corrections the supervision, management and control of the State prisons and the responsibility for the persons confined therein. However, with respect to the Department’s role in foreign prisoner transfers for certain undocumented aliens, Penal Code section 5028 specifically provides, in part, the following:

“(a) Upon the entry of any person who is an undocumented alien subject to deportation into a facility operated by the [Department], and at least every year thereafter, the Director of Corrections shall inform the person that he or she may apply to be transferred to serve the remainder of his or her prison term in his or her country of origin.

specific challenged rules in this request for determination, DOM sections 62040.17 through 62040.19, are essentially the Department's uncodified rules and procedures for handling inmate applications for transfers to foreign counties and for screening inmates on behalf of the Board of Prison Terms. A summary of these DOM sections is as follows: Section 62040.17 principally names the specific countries to which inmate transfers may be considered. Section 62040.17.1 sets forth the criteria for inmate transfers to France. Section 62040.17.2 sets forth the criteria for inmate transfers to countries other than France. Section 62040.18 provides that when an inmate indicates an interest in the prisoner transfer program, the inmate's counselor shall screen the inmate's records to determine if the inmate meets the criteria (of sections 62040.17 through 62040.17.2), and, if the inmate does not qualify, the inmate shall be provided, in writing, the reasons why and a copy shall be sent to the Board of Prison Terms legal counsel. Finally, section 62040.19 sets forth the "processing" requirements for inmates requesting transfers to foreign counties.

### **ANALYSIS**

A determination of whether the rules contained in DOM sections 62040.17 through 62040.19 are "regulations" subject to the Administrative Procedure Act ("APA") (Chapter 3.5 (commencing with section 11340), Part 1, Division 3, Title 2, Government Code) depends on (1) whether the APA is generally applicable to the quasi-legislative enactments of the Department, (2) whether the challenged rules are "regulations" within the meaning of Government Code section 11342.600, and (3) whether the challenged rules fall within any recognized exemption from APA requirements.

(1) As a general matter, all state agencies in the executive branch of government and not expressly exempted are required to comply with the rulemaking provisions of the APA when engaged in quasi-legislative activities. (*Winzler & Kelly v. Department of Industrial Relations* (1981) 121 Cal.App.3d 120, 126-128, 174 Cal.Rptr. 744, 746-747; Gov. Code, secs. 11342.520 and 11346.) Moreover, the term "state agency" includes, for purposes applicable to the APA, "every state

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(b) The [Department] shall implement and maintain procedures to process applications for the transfer of prisoners to their countries of origin under subdivision (a), and shall forward the applications to the Board of Prison Terms for appropriate action . . . ."

office, officer, department, division, bureau, board, and commission.” (Gov. Code, sec. 11000.)

Penal Code section 5054 provides that:

“The supervision, management and control of the State prisons, and the responsibility for the care, custody, treatment, training, discipline and employment of persons confined therein are vested in the director [of the Department of Corrections].”

The Department is in neither the judicial nor legislative branch of state government, and therefore, unless expressly exempted therefrom, the APA rulemaking requirements generally apply to the Department.

In this connection, Penal Code section 5058, subdivision (a), states in part as follows:

“The director [of the Department of Corrections] may prescribe and amend rules and regulations for the administration of the prisons . . . . The rules and regulations shall be promulgated and filed *pursuant to [the APA]* . . . . [Emphasis added.]”

Thus, the APA rulemaking requirements generally apply to the Department. (See *Poschman v. Dumke* (1973) 31 Cal.App.3d 932, 942, 107 Cal.Rptr. 596, 603 (agency created by Legislature is subject to and must comply with APA.))

(2) Government Code section 11340.5, subdivision (a), prohibits state agencies from issuing rules without complying with the APA. It states as follows:

“(a) *No* state agency shall issue, utilize, enforce, or attempt to enforce *any* guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, which is a [‘] regulation[’] as defined in Section 11342.600, *unless* the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule has been adopted as a regulation and filed with the Secretary of State pursuant to [the APA]. [Emphasis added.]”

Government Code section 11342.600, defines “regulation” as follows:

“ . . . every rule, regulation, order, or standard of general application *or* the amendment, supplement, or revision of any rule, regulation, order, or standard adopted by *any* state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure. [Emphasis added.]”

According to *Engelmann v. State Board of Education* (1991) 2 Cal.App.4<sup>th</sup> 47, 62, 3 Cal.Rptr.2d 264, 274-275, agencies need not adopt as regulations those rules contained in a “statutory scheme which the Legislature has [already] established . . . .” But “to the extent [that] any of the [agency rules] depart from, or embellish upon, express statutory authorization and language, the [agency] will need to promulgate regulations . . . .”

Under Government Code section 11342.600, a rule is a “regulation” for these purposes if (1) the challenged rule is *either* a rule or standard of general application *or* a modification or supplement to such a rule and (2) the challenged rule has been adopted by the agency to *either* implement, interpret, or make specific the law enforced or administered by the agency, *or* govern the agency’s procedure. (See *Grier v. Kizer* (1990) 219 Cal.App.3d 422, 440, 268 Cal.Rptr. 244, 251;<sup>6</sup> *Union of American Physicians & Dentists v. Kizer* (1990) 223 Cal.App.3d 490, 497, 272 Cal.Rptr. 886, 890.)

For an agency rule to be a “standard of general application,” it need not apply to all citizens of the state. It is sufficient if the rule applies to all members of a class, kind, or order. (*Roth v. Department of Veteran Affairs* (1980) 110 Cal.App.3d 622, 630, 167 Cal.Rptr. 552, 556; see *Faulkner v. California Toll Bridge Authority* (1953) 40 Cal.2d 317, 323-324 (a standard of general application applies to all members of any open class).) The challenged rules contained in DOM sections 62040.17 through 62040.19 apply to all members of the open class of inmates in California prisons who might seek transfers to foreign prisons. An “open class” is one whose membership could change, and the membership of the class of inmates in California prisons could certainly change over time. Consequently, these DOM sections are standards of general application.

Furthermore, the specific rules contained in DOM sections 62040.17 through 62040.19 implement, interpret, or make specific the law enforced or administered

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6. OAL notes that a 1996 California Supreme Court case stated that it “disapproved” of *Grier* in part. *Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal.4th 557, 577, 59 Cal.Rptr.2d 186, 198. *Grier*, however, is still good law for these purposes.

by the Department or govern the Department's procedure. In fact, the criteria and procedures for the transfer of inmates to foreign prisons set forth in these DOM sections *both* implement, interpret, or make specific Penal Code sections 5028, 5054, and 5058 *and* govern the Department's procedure for processing inmate requests for transfer to foreign countries. We note that the rules set forth in DOM sections 62040.17 through 62040.19 are generally not contained either in existing statutes directly applicable to the Department or in existing regulations duly adopted under the APA. In other words, these rules "embellish upon" existing law.

Thus, DOM sections 62040.17 through 62040.19 are "regulations" as defined in Government Code section 11342.600.

(3) With respect to whether the rules contained in DOM sections 62040.17 through 62040.19 fall within any recognized exemption from APA requirements, generally, all "regulations" issued by state agencies are required to be adopted pursuant to the APA, unless *expressly* exempted by statute. (Gov. Code, sec. 11346; *United Systems of Arkansas, Inc. v. Stamison* (1998) 63 Cal.App.4th 1001, 1010, 74 Cal.Rptr.2d 407, 411 ("When the Legislature has intended to exempt regulations from the APA, it has done so by clear, unequivocal language.") (Emphasis added.)

The Department does not contend that any *express* statutory exemption applies.<sup>7</sup> Our independent research having also disclosed that no express statutory exemption applies, we conclude that none applies.

In summary, we conclude that DOM sections 62040.17 through 62040.19 relating to the transfer of prisoners to foreign countries are "regulations" as defined in Government Code section 11342.600 which are required to be adopted pursuant to the rulemaking provisions of the APA.<sup>8</sup>

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7. In the Department's "Response to Request for Determination," dated July 20, 2001, the Department (on page 2 of the Response) has stated as follows: "The staff at Avenal State Prison erred in citing DOM sections 62040.17-62040.19 as the reason for not pursuing the transfer of inmate Toth to Sweden." The Department's conclusion (on page 2 of the Response) includes the following: "DOM sections 62040.17-62040.19 have not been promulgated through the APA process and are not to be utilized. The Department needs to promulgate regulations . . . ."

8. We note that DOM sections 62040.17 through 62040.19 are among a number of DOM provisions that have been designated as "not approved for use" within the Department (as listed in an "Administrative Bulletin" or "Notice of Change to Department Operations

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Manual” issued by the Department). Despite this designation, DOM sections 62040.17 through 62040.19 and some other sections “not approved for use” continue to be printed in the DOM and are available for use (and, in some instances, continue to be used) by institutions within the Department. Notwithstanding that sections 62040.17 through 62040.19 and other such sections have been designated as “not approved for use,” if they are not formally rescinded and deleted from the DOM, and continue to be available for use by institutions within the Department, we think these sections remain statewide rules of the Department subject to the APA.